No. 84-435

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Congress intended 18 U.S.C. 844(i), which prohibits the destruction by fire of "any building * * * used in * * * any activity affecting interstate or foreign commerce," to apply to insurance fraud arson of rental property heated by gas that moved in interstate commerce.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 738 F.2d 825. The opinion of the district court is reported at 563 F. Supp. 1085.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1984. A petition for rehearing was denied on July 25, 1984. The petition for a writ of certiorari was filed on September 17, 1984, and was granted on February 19, 1985. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 844(i) provides:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of attempting to destroy by fire a two-unit apartment building, in violation of 18 U.S.C. 844(i). He was sentenced to ten years' imprisonment. The court of appeals affirmed (Pet. App. 4a).

1. Petitioner, a member of the Chicago Fire Department, owned four buildings, including a two-unit apartment building at 4530 South Union Street in Chicago. The building was heated by gas that had moved in interstate commerce. Petitioner earned rental income from the building and treated it as a business property for tax purposes, claiming deductions for depreciation and expenses. His buildings were covered by business insurance policies; Allstate Insurance Company insured the building on South

Union Street for $40,000. Tr. 150-155; Stip. 11; Exh. 17.[1]

In February 1983, the second floor unit of appellant's building on South Union Street was occupied by a family of eight. The first floor unit had also been rented, but the occupant stayed there only periodically. Petitioner needed to make repairs to the building to avoid fines for housing code violations. He decided to destroy the building and obtain the insurance proceeds rather than make the needed repairs. Tr. 50, 98-102; Exh. 1.

Petitioner hired Ralph Branch, who had recently been released from prison, to set fire to the building. He showed Branch how to start the fire by using a natural gas line in the basement. When Branch asked petitioner how his tenants would escape the fire, petitioner replied, "if they do they do, if they don't, they don't." In order to provide petitioner with an alibi, the arson attempt was scheduled for the evening of February 8, 1983, when petitioner was on duty at the fire station. The attempt failed, however. Petitioner asked Branch to try again on February 10, using gasoline. But Branch then reported the planned arson to the FBI and agreed to tape record a telephone conversation with petitioner. During the conversation, petitioner asked Branch if he was going to start the fire that evening, Branch assured petitioner that he would, and petitioner told Branch where he had placed a can of gasoline. Petitioner was arrested following the conversation, and the fire was never set. Tr. 31-50.

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[1] The transcript of the trial, which is on file with the Court, refers to Stip. 11, at 153-154. Stipulation 11, which will be printed in the Joint Appendix, states that the building on South Union Street was insured by Allstate.

2. Prior to trial, petitioner moved to dismiss, claiming that the indictment failed to allege a crime under Section 844(i). In particular, petitioner claimed that that Section 844(i) does not apply because the building he attempted to destroy was not "used in * * * any activity affecting interstate or foreign commerce." Relying on the Second Circuit's decision in *United States* v. *Mennuti*, 639 F.2d 107 (1981), petitioner claimed that Section 844(i) does not reach destruction of residences.

The district court rejected this argument, for two reasons. First, numerous courts had given Section 844(i) a broad reading in light of its proscription of the destruction of "any building." The Second Circuit itself, subsequent to *Mennuti*, had approved a jury instruction stating that "[a] building is used * * * in an activity [a]ffecting interstate commerce * * * if oil or gas moving in interstate commerce is used to heat the building" (563 F. Supp. at 1087, citing *United States* v. *Barton*, 647 F.2d 224, 231-232 (2d Cir.), cert. denied, 454 U.S. 857 (1981)). The court found that the gas used to heat the building petitioner attempted to destroy had moved in interstate commerce and that this brought petitioner's offense within the reach of Section 844(i) (563 F. Supp. at 1086-1087).[2]

Alternatively, the district court held that petitioner's offense was covered by Section 844(i) because the property he attempted to destroy was "business property." The district court noted that the Second Cir-

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[2] At the conclusion of the trial, petitioner moved for a verdict of acquittal, alleging that the gas used to heat the building was manufactured solely within Illinois. The district court rejected this argument, and petitioner now concedes that the gas used to heat the building moved in interstate commerce (Br. 4 n.5).

cuit in *Mennuti* had based its ruling that Section 844 (i) does not reach residential property on a statement in the House report describing Section 844(i) as "a very broad provision covering substantially all business property" (H.R. Rep. 91-1549, 91st Cong., 2d Sess. 70 (1970)). From petitioner's perspective, the district court held, the building was business property since it was used in "his 'side' business of providing housing space for rent" (563 F. Supp. at 1088 (footnote omitted)).

3. The court of appeals affirmed petitioner's conviction. Relying on its prior decision in *United States* v. *Sweet*, 548 F.2d 198 (7th Cir.), cert. denied, 430 U.S. 969 (1977), it held that any activity having an effect on interstate commerce, even a de minimis effect, brings a building within the reach of Section 844(i). The court did not rely on the district court's finding that the building petitioner attempted to destroy was heated by fuel that moved interstate. Instead it relied on the district court's alternative conclusion that the building was "business property." [3]

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[3] The court stated (Pet. App. 3a):

> The South Union Street apartment building was one of four pieces of property that Russell owned and rented to tenants. Russell's income tax returns from 1976 through 1982 demonstrated that Russell treated these properties as income property for which he claimed business deductions for depreciation and expenses. These properties also were covered by business fire insurance policies, in contrast to the defendant's own residence which he covered by a homeowner's policy limited to owner-occupied premises. At the time of the incident in question, Russell lived in neither unit of the South Union Street property. The district court's jurisdiction thus could be based on the fact that this property was business or commercial property under Section 844(i), and we affirm the court's jurisdiction on this basis.

SUMMARY OF ARGUMENT

Section 844(i) broadly prohibits the destruction by fire of "any building * * * used in * * * any activity affecting interstate or foreign commerce." By this language, Congress intended to exercise its commerce power to the fullest extent and to protect nearly all types of property. The legislative history of the Section 844(i) makes this unmistakably clear.

Petitioner concedes that Congress has power under the Commerce Clause to prohibit arson of the sort he attempted. Relying on *United States* v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981), petitioner argues that Congress did not intend to exercise its commerce power fully in enacting Section 844(i), but intended to cover "business property" only. This argument is wrong for three reasons. First, Congress in 1970 specifically rejected the restriction on Section 844(i)'s coverage that petitioner advocates. Second, examination of Section 844(e) confirms that Congress did not intend to distinguish residential property from business property. Third, the statement in the legislative history on which petitioner primarily relies is not inconsistent with the conclusion that Congress exercised its commerce power fully.

Viewed according to this Court's rulings on the scope of the commerce power, the building petitioner attempted to destroy was "used in * * * [an] activity affecting interstate commerce" in three ways. The building was heated by gas that moved in interstate commerce, it was used for rental purposes, and petitioner attempted to use it to defraud an insurance company.

On its face, Section 844(i) provides for broad coverage. Since this comports with clear congressional intent, the rule of lenity does not apply. Nor does

this case present a problem of federal-state relations, since Congress has not preempted the states, but has provided an additional weapon for use against arsonists, and state and local officials have supported federal involvement in this area.

ARGUMENT

I. CONGRESS INTENDED TO EXERCISE ITS COMMERCE CLAUSE POWER FULLY UNDER SECTION 844(i) AND DID NOT INTEND TO ESTABLISH A "BUSINESS PROPERTY" LIMITATION

Petitioner concedes that Congress has the power, under the Commerce Clause, to enact an arson statute "encompassing virtually every building in the land" (Br. 16). The Second Circuit, on which petitioner relied, also assumed that Congress, acting under its commerce power, could prohibit arson of all types (*Mennuti*, 639 F.2d at 110). This concession is correct. See *Perez* v. *United States*, 402 U.S. 146 (1971); pp. 14-15, *infra*.[4] Thus, it is essential to petitioner's argument that he show that Congress did not intend to exercise its commerce power fully. But the language of Section 844(i), the structure of the statute of which it is a part, and its legislative history show that Congress intended to exercise its power fully. Moreover, the legislative history of the statute and its structure specifically show that Congress did not intend to adopt the limitation petitioner proposes.

1. The starting point for any question of statutory construction is the language of the statute. If the

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[4] See also Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 Ariz. L. Rev. 271 (1973); Bogen, *The Hunting of the Shark: An Inquiry into the Limits of Congressional Power under the Commerce Clause*, 8 Wake Forest L. Rev. 187 (1972).

"terms of a statute [are] unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances' " (*Garcia* v. *United States*, No. 83-6061 (Dec. 10, 1984), slip op. 5, quoting *TVA* v. *Hill*, 437 U.S. 153, 187 n.33 (1978)).[5] Section 844(i) broadly prohibits the destruction, by means of fire or an explosive, of "any building * * * used in * * * any activity affecting interstate or foreign commerce." In ordinary usage, the phrase "any building" includes residential buildings.[6] Hence, the plain meaning of Section 844(i) includes buildings of the sort petitioner attempted to destroy.[7] The phrase "used in * * * any activity affecting interstate or foreign commerce" signifies Congress's intention to assert its full power under the Commerce Clause. See *Scarborough* v. *United States*, 431 U.S. 563, 571-572 (1977); *National Labor Relations Board* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963).[8] Nothing on the

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[5] See also *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 4; *United States* v. *Turkette*, 452 U.S. 576, 580 (1981).

[6] The "ordinary * * * common meaning" (*Perrin* v. *United States*, 444 U.S. 37, 42 (1979)) of "building" is a "constructed edifice designed to stand more or less permanently * * * and serving as a dwelling." *Webster's Third New International Dictionary* 292 (1981).

[7] Compare *United States* v. *Fears*, 450 F. Supp. 249 (E.D. Tenn. 1979) ("any building" in 18 U.S.C. 844(e) means "any building," including residences).

[8] In *Scarborough*, which involved the construction of a criminal statute prohibiting possession of a firearm "in or affecting commerce" by a felon (see n.15, *infra*), the Court stated: "As we have previously observed, Congress is aware of the 'distinction between legislation limited to activities "in commerce" and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce' " (431 U.S. at 571 (citation omitted)).

face of Section 844(i) suggests a congressional intent to limit its coverage. Indeed, Congress, by adopting "affecting commerce" language, indicated that it intended to cover any building reachable through the full exercise of its commerce power.

The legislative history confirms this straightforward reading of Section 844(i). The 1970 House committee report accompanying the bill specifically cited *Reliance Fuel Corporation* for this very point. It stated that by using the term "affecting [interstate or foreign] 'commerce,'" Congress intended to exercise " 'the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause,' *NLRB* v. *Reliance Fuel Corp.*" (H.R. Rep. 91-1549, 91st Cong., 2d Sess. 70 (1970)). Representative McCullough, who introduced the bill containing Section 844(i), stated on the floor of Congress that the provision extended "to the full extent of our constitutional power" (116 Cong. Rec. 35198 (1970)).[9] Congress rarely states its intention so clearly. It intended to exercise its commerce power fully through Section 844(i).

2. Despite the broad language of the statute and the clear statements in the legislative history, petitioner contends that Congress did not intend to exercise its commerce power fully. Petitioner's argument is based on a statement in the House Report, immediately following the statement that Section 844(i) represents " 'the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause,' " which describes Section 844(i) as "a very broad provision covering substantially all business property"

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[9] See also 116 Cong. Rec. 37187 (1970) (remarks of Rep. MacGregor) ("Nearly all types of property will now be protected.").

(H.R. Rep. 91-1549, *supra*, at 69-70). The Second Circuit (*Mennuti*, 639 F.2d at 111), like petitioner (Pet. 10), stressed that statement in concluding that Section 844(i) does not represent the full exercise of Congress's commerce power but is limited to the destruction of "business property." [10] Thus, petitioner in effect argues that "any building" should be read as "any business property." This Court has consistently rejected similar attempts to limit a statutory term that is preceded by the word "any." [11] It should likewise reject petitioner's attempt to limit "any building" to "any business property," for three reasons.

First, and most important, the House Committee, after holding hearings on the bill containing Section 844(i), specifically deleted the very limitation on Section 844(i)'s reach that petitioner proposes. As originally proposed, Section 844(i) prohibited the destruction of "any building * * * *used for business purposes* by a person engaged in commerce or in any activity affecting commerce" (emphasis supplied). During congressional hearings on the proposed legis-

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[10] The Second Circuit stressed Congress's use of the verb "used" in Section 844(i) (639 F.2d at 110) as well as the "business property" phrase in the legislative history. The use of the verb "used" does nothing more than require that some connection be made between the building and an effect on interstate commerce; that connection may be indirect and of small magnitude (see pp. 14-15, *infra*).

[11] See *Garcia* v. *United States*, *supra* ("any money or other property of the United States" in 18 U.S.C. 2114 is not limited to "postal" money); *United States* v. *Turkette*, *supra* ("any enterprise" in 18 U.S.C. 1962(c) is not limited to "legitimate" enterprises); *Russello* v. *United States*, *supra* ("any interest" in 18 U.S.C. 1963(a)(1) is not limited to interests in an enterprise).

lation, representatives from the Department of Justice said that the provision was intended to reach business property only and that a businessman's home would be excluded from the provision. *Explosives Control: Hearings on H.R. 17154, H.R. 16699, H.R. 18573 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 73-74 (1970) (testimony of Will Wilson, Assistant Attorney General, and Michael Abbell, Attorney) [hereinafter cited as *1970 Hearings*]. Several witnesses testified that a limitation of coverage to business property was too restrictive because terrorists had recently bombed schools, police stations, and churches, buildings that might not be considered "business property," and urged the subcommittee to delete the term "used for business purposes" from the proposed legislation. Representative Goldwater stated that the bill should "cover churches, schools, and real or other property" (*id.* at 289). Representative Wylie stated that the provision should be broadened to cover "a private dwelling or a church or other property not used for business" (*id.* at 300). See also *1970 Hearings* 78-79 (statement of Rep. Neal Smith). Members of the subcommittee and its counsel recognized that the provision could be broadened by deleting "business purposes" from the proposed legislation (*id.* at 73-74).

The subcommittee deleted the phrase and Congress enacted Section 844(i) without it.[12] This deletion

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[12] It is noteworthy that the Second Circuit, in developing the "business property" requirement in *Mennuti*, was apparently unaware that Congress had deleted such a requirement from the text of Section 844(i). This undercuts the conclusions the court drew about congressional intent based on its scrutiny of the words of the statute.

led Representative McCullough, who introduced the bill that included the provision that became Section 844(i), to state that "the committee extended the provision protecting interstate and foreign commerce * * * to the full extent of our constitutional power" (116 Cong. Rec. 35198 (1970)). Since Congress specifically deleted a "business purpose" limitation from the words of the statute, such a limitation cannot be reimposed by the phrase in the House report.[13]

Second, the structure of Section 844 further confirms that Congress did not intend to limit its coverage to business property. Section 844(e) prohibits threats to destroy "any building" if made "through the use of the mail, telephone, telegraph, or other instrument of commerce." The provision contains no requirement that the threatened building be used in an activity affecting commerce. Thus, it is clear that a threat to burn any building, including a residence, is covered by Section 844(e), if the threat is made through the mail or over the telephone. *United States* v. *Fears*, *supra*. There is no reason why Congress would want to prohibit a threat to burn a building but not cover the actual burning of the same building. Rather, it is apparent that Congress intended both subsections to reach as broadly as the Commerce Clause would permit. The phrase

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[13] The likely origin of the phrase in the House report on which petitioner relies also shows that it is not entitled to weight. It appears to have been reproduced almost verbatim from the statement of the Justice Department officials describing the proposed bill before the business property phrase was deleted. See *1970 Hearings* 37. Thus, the phrase in the Report appears to be a mere inadvertence, describing a prior version of the bill.

"through the use of the mail, telephone, telegraph, or other instrument of commerce" in Section 844(e) and "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce" in Section 844(i) indicate that Congress was relying on its commerce power and intended to reach as far as that power extends.[14]

Third, the statement in the House report that Section 844(i) covers "substantially all business property" is not inconsistent with the statement it follows, that the section represents Congress's full exercise of its commerce power. The statement may be regarded as providing an important example of property that Section 844(i) covers. As the district court recognized, the "specific mention of 'business property' does not necessarily carry with it the negative pregnant that all other property falls beyond the statute's reach" (563 F. Supp. at 1088 n.2).

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[14] One Congressman, Representative Celler, seemed to think that Congress lacked power to prohibit the destruction of residential property. He stated that "the mere bombing of a private home even under this bill would not be covered" (116 Cong. Rec. 35359 (1970) (remarks of Rep. Celler)). He explained that the bill reached only property controlled, owned, or financed by the federal government (*ibid.*). This statement is clearly incorrect. While Section 844(f) reaches federal property, Section 844(i) reaches property in or affecting interstate or foreign commerce. Representative Celler may have been thinking of his own proposed legislation to prohibit bombings—which did not contain any provision comparable to Section 844(i) (see *1970 Hearings* 21-23)—when he stated that the bill reached only federal property and not residences. Since the plain meaning and legislative history refute Representative Celler's statement, it should be given no weight. *Garcia* v. *United States*, No. 83-6061 (Dec. 10, 1984), slip op. 6, 8; *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

II. PETITIONER USED THE BUILDING IN ACTIVITIES AFFECTING INTERSTATE COMMERCE

Congress's power under the Commerce Clause is exceedingly broad. Chief Justice Marshall recognized for the Court, in *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824), that Congress possesses plenary power to regulate any activity having an effect on interstate commerce. That principle was firmly established in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), where the Court held that wheat grown and consumed on the same farm nevertheless affected interstate commerce, although the effect was indirect. The Court there pointed out that while the "appellee's own contribution to the demand for wheat may be trivial by itself, * * * his contribution, taken together with that of others similarly situated, is far from trivial." *Id.* at 127-128. Civil Rights Act cases reaffirmed that Congress may regulate activities affecting interstate commerce, even though the substantiality of the effect on interstate commerce becomes apparent only in the aggregate. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964). These cases were all relied upon in *Perez* v. *United States*, 402 U.S. 146 (1971), which made clear that the same principles apply when Congress exercises its commerce power in a criminal law context (see Stern, *The Commerce Clause Revisited—The Federalization of Interstate Crime*, 15 Ariz. L. Rev. 271 (1973); L. Tribe, *American Constitutional Law* 236-237 (1978)).

Under these principles, the government must show only a minimal connection between interstate commerce and the "use" of the particular building that is within the regulated class. See *Perez*, 402 U.S. at

154. Accordingly, in *Scarborough* v. *United States*, 431 U.S. 563 (1977), the Court considered the language of 18 U.S.C. App. 1202(a), which prohibits a felon from possessing a firearm "in commerce or affecting commerce." [15] The Court concluded that some connection between the possession and interstate commerce was required by the statute, but, in light of Congress's use of "affecting commerce," only a minimal connection—"Congress sought to reach possessions broadly, with little concern for when the nexus with commerce occurred. * * * [T]here is no question that Congress intended no more than a minimal nexus requirement" (431 U.S. at 577).[16] The Court frankly noted that "Congress was not particularly concerned with the impact on commerce except as a means to insure the constitutionality of" the firearms statute (*id.* at 575 n.11). The same is true here, as the 1970 legislative history clearly shows.

Petitioner used his building on South Union Street in an activity affecting interstate commerce by heating it with gas that moved interstate. If the building had been destroyed, that would have affected the amount of gas shipped in interstate commerce. The effect might have been minimal in the individual instance,[17] but that is all that is required when Con-

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[15] Section 1202(a) provides: "Any person who * * * has been convicted * * * of a felony * * * who receives, possesses, or transports in commerce or affecting commerce, * * * any firearm" may be fined and imprisoned.

[16] The holding in *Scarborough* was that Section 1202(a) prohibits possession of firearms by felons where the firearm was obtained prior to the felony conviction.

[17] The gas bill for the second-floor unit of petitioner's building was $103.62 for the month prior to petitioner's attempt to destroy it. Tr. 113-116.

gress is exercising its commerce power fully, over a class of cases.

The courts of appeals have recognized that Section 844(i) reaches buildings having similar effects on interstate commerce. In *United States* v. *Barton*, 647 F.2d 224, 232 (2d Cir. 1981), the court found that Section 844(i) covered the burning of a building that was heated by out-of-state fuel. In *United States* v. *Andrini*, 685 F.2d 1094, 1096 (9th Cir. 1982), the court held that Section 844(i) covered the burning of an office building that was under construction because it was being constructed from out-of-state materials. While the building in *Barton* was not a residence, and the building under construction in *Andrini* was going to house commercial enterprises, the particular ties between the buildings and interstate commerce had nothing to do with their business uses. There is no reason why the use of out-of-state fuel to heat a building used for gambling purposes, as in *Barton*, connected the building to interstate commerce any more than it ties petitioner's building to interstate commerce. Similarly, if the use of out-of-state construction materials connects a building with interstate commerce, as in *Andrini*, it does not matter that the building will be an office building rather than a residence when it is completed. As the district court here concluded, the use of out-of-state gas to heat the building petitioner attempted to burn established that it was used in an activity affecting interstate commerce.[18]

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[18] As the Second Circuit noted (*Mennuti*, 639 F.2d at 112), if the use of gas moving in interstate commerce to heat a residence establishes a sufficient connection with interstate commerce to satisfy the jurisdictional requirement of Section 844(i), then the use of gasoline moving in interstate com-

The building petitioner attempted to destroy was also used in an activity affecting interstate commerce because he rented it. Renting the property had two effects on commerce—one resulting from the commercial nature of the rental business and the other resulting from its effect on the movement of people. Petitioner's rental business affected commerce because he obtained income from his buildings and deducted expenses attributable to them. His income and expenses affected commerce just as the income and expenses of any other business does. In addition, this Court has held that the sale of residential property may have an effect on interstate commerce under the antitrust laws because of its effect on "the interstate movement of people" (*McLain* v. *Real Estate Board*, 444 U.S. 232, 245 (1980)). The renting of residential units—viewed, again, in the aggregate of the entire class of cases—affects both interstate and intrastate movement of people, and hence affects commerce.

The courts of appeals have, accordingly, concluded that rental property is within the scope of Section 844(i). The Eighth Circuit, in *United States* v. *Hansen*, No. 84-1500 (Feb. 22, 1985), slip op. 4, held that a 14-unit apartment building was covered by Section 844(i), both because it was "income-producing rental property" and because it was "rented to tenants who moved interstate." Similarly, in *United States* v. *Zabic*, 745 F.2d 464, 470-471 (7th Cir. 1984), the court held that a 43-unit apartment build-

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merce as fuel for a truck should establish a sufficient connection as well. This would lead to a different result from that reached in *United States* v. *Monholland*, 607 F.2d 1311 (10th Cir. 1979).

ing was within the coverage of Section 844(i). Similarly here, as the court of appeals and the district court concluded, petitioner rented the building he attempted to destroy and this use affected interstate commerce. Although the effect of his particular building on the movement of people would be less substantial than the effect of a larger building, like the 43-unit building in *Zabic*, or a building that rented to transients, as in *Hansen*, the difference is a matter of degree. Similarly, while the income and expenses generated from his building would likely be smaller than that produced by larger buildings, that also is a matter of degree. Petitioner's building nevertheless is within the class whose cumulative effect on interstate commerce [19] made it an appropriate subject for Congress's exercise of the commerce power.

Petitioner also used his building in an activity affecting interstate commerce when he attempted to destroy it to defraud an insurance company. The hearing on the bill that amended Section 844(i) in 1982—by adding the words "or fire" to clarify that the section covered all means of arson as well as bombing—showed a focused congressional concern on insurance fraud.[20] A representative of the insurance

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[19] See p. 19 & n.21, *infra*.

[20] The amendment was intended primarily to make clear that Congress disapproved the result in *United States* v. *Gere*, 662 F.2d 1291 (9th Cir. 1981), which had held, contrary to the view that three other circuits had adopted, that the destruction of a building by the use of gasoline was not covered by Section 844(i). See, *e.g.*, H.R. Rep. 97-678, 97th Cong., 2d Sess. 2 & nn. 5 & 6 (1982); *Anti-Arson Act of 1982: Hearings on H.R. 6377 and H.R. 6454 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 11 (1982) [hereinafter cited as *1982 Hearing*]. The

industry testified in support of the bill because "the insurance industry * * * is concerned and alarmed by the escalation of arson fraud schemes" (*Anti-Arson Act of 1982: Hearing on H.R. 6377 and H.R. 6454 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 39 (1982) [hereinafter cited as *1982 Hearing*]). He presented a report which showed that insurance fraud was a motive in approximately twelve percent of commercial arson fires and fourteen percent of residential arson fires (*id.* at 69),[21] resulting in millions of dollars in losses to the insurance industry. Congress was advised that insurance industry representatives estimated that the Bureau of Alcohol, Tobacco and Firearms' "arson program saved over $54 million in false claims in 1980" (128 Cong. Rec. H4958 (daily ed. Aug. 2, 1982)). The chairman of the House Committee holding the hearings assumed that the amended Section 844(i) would cover arson fraud, as did others at the hearings.[22] Thus, petition-

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House report provided that the "jurisdictional circumstances enumerated [in Section 844] otherwise remain unchanged" (H.R. Rep. 97-678, *supra*, at 1).

[21] Other motives for arson include vandalism, revenge, concealment of other crimes, and pyromania (*1982 Hearing* 69). Congressman McClory noted that in 1979 alone fires accounted for $1.3 billion in direct damages. He added that "[a]rson causes approximately 1,000 deaths each year * * * and many arson incidents involve organized crime." 128 Cong. Rec. H4958 (daily ed. Aug. 2, 1982).

[22] The chairman asked Treasury Department enforcement officials whether federal jurisdiction over arson "ought to be *limited* to those that involve schemes to fraudulently obtain insurance proceeds" (*1982 Hearing* 36 (emphasis added)). The enforcement officials responded that Section 844 should not be limited in that way (*1982 Hearing* 36-38).

er's motive in attempting to destroy the building to obtain insurance proceeds establishes a direct connection with interstate commerce.[23]

In sum, the record establishes three ties between the use of petitioner's building and interstate commerce. Since Congress intended to exercise its commerce power fully, each of those connections satisfies the jurisdictional requirement of Section 844(i).

III. THE RULE OF LENITY DOES NOT APPLY AND FEDERALISM PROBLEMS ARE NOT PRESENTED IN THIS CASE

Petitioner makes two arguments (Br. 16-18) based on the allegation that Section 844(i) is ambiguous. The first is that, under the rule of lenity, ambiguous statutes should be narrowly construed. Second, because Section 844(i) criminalizes behavior that is also punished by the states, petitioner contends that it should be construed narrowly, under *United States* v. *Bass*, 404 U.S. 336 (1971). Petitioner suggests that the proper narrow construction resulting from the application of lenity or federalism concerns is the

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[23] The courts of appeals other than the Second Circuit have not addressed the question whether insurance fraud arson necessarily affects interstate commerce. That court in *Mennuti* rejected this argument, stating that "we deem it inconceivable that Congress was thinking of the business of arson" when it enacted Section 844(i) (639 F.2d at 113). That case, as well as *Barton*, which expressed doubt about whether "the mere fact that a building is insured" establishes a tie to interstate commerce (647 F.2d at 232), was decided prior to the 1982 amendment of Section 844. As indicated, the hearing on that bill showed a focused congressional concern on arson to defraud insurance companies. The statistical evidence presented by the insurance industry at the hearings provides a firm basis for the conclusion that insurance fraud arson has a substantial impact on interstate commerce.

exclusion of residential property from Section 844 (i)'s reach. These arguments are unpersuasive.

a. The rule of lenity has no applicability unless a statute contains a "grievous ambiguity" in its language and structure (*Huddleston* v. *United States*, 415 U.S. 814, 831 (1974)). The rule resolves ambiguities, it does not create them (*Callahan* v. *United States*, 364 U.S. 587, 598 (1961)). Thus, no reason exists "to narrow the plain meaning of even a criminal statute on the basis of a gestalt judgment as to what Congress probably intended" (*Garcia* v. *United States*, slip op. 9). As we have shown, Congress clearly expressed its intention to exercise its commerce power to the fullest, and that power extends to arson of nearly all types of buildings. Thus, there is no reason to apply the rule of lenity. Furthermore, petitioner's argument is meritless because his proposed construction is contrary to Congress's intent, as we have shown.[24]

b. Nor is there reason to construe Section 844(i) narrowly to avoid federalism problems. Congress fully recognized in 1970 that it was criminalizing activity that was also criminal under state law. It clearly intended to provide overlapping jurisdiction—Section 848 provides that Congress did not intend to

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[24] In addition, the rule of lenity is based in part on the idea that criminal statutes should give "fair warning" (*McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)). The Court in *Bass* recognized that the notion that a person will read the law to determine whether or not action is lawful is a fiction, but it nevertheless noted that the defendant's criminal action—possession of firearms by a felon—was not criminal in many states (404 U.S. at 348 n.15). That weighed in favor of applying the rule of lenity in *Bass*. In this case, by contrast, it cannot be argued that petitioner thought that burning down a residence was lawful.

preempt state law.[25] The subcommittee considered and rejected a provision that would have required the Attorney General to authorize prosecutions under Section 844 (*1970 Hearings* 32). It decided instead to rely upon government enforcement officials to determine which cases warranted federal involvement in either the investigation or the prosecution (*id.* at 76-77).[26]

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[25] Section 848 provides:

> No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

[26] The subcommittee determined that federal officials could, in any event, decide not to proceed under the federal statute in particular cases best left to local investigation or prosecution (*1970 Hearings* 77). One of the bill's authors recommended, "with respect to those situations which involve a duality of jurisdiction," that the Attorney General confer "with local authorities and with State authorities" in determining whether federal involvement is warranted (*id.* at 69-70).

At the 1982 hearing, enforcement officials from the Treasury Department testified that the Bureau of Alcohol, Tobacco and Firearms had "focused its resources in the arson area on those schemes involving commercial premises * * * or members of organized 'arson rings' " and would "continue its arson program under the same policies and guidelines." In this connection, a Treasury Department official testified that the bill would "not make every arson a federal crime." *1982 Hearing* 14. Congress approved the Bureau's focus on commercial property and arson rings (128 Cong. Rec. H4958 (daily ed. Aug. 2, 1982)). Congress thus broadly federalized arson law, relying upon federal officials to select appropriate cases for federal involvement and to leave other prosecutions to state and local authorities.

The statute at issue in this case is therefore very different from the firearms statute considered in *Bass*, which had been "hastily passed, with little discussion, no hearings, and no report" (404 U.S. at 344). In those circumstances, the Court construed the statute narrowly because it was unwilling to conclude from silence that Congress had "significantly changed the federal-state balance" (*id.* at 349). In contrast, in enacting Section 844 in 1970 and amending it in 1982, Congress was well aware that it was creating overlapping federal jurisdiction in areas of criminal law traditionally reserved to the states.

Moreover, state and local governments have generally welcomed federal involvement in cases brought under Section 844 and supported efforts to broaden it. At the *1970 Hearings*, reference was made to a dispute between city officials in Seattle and the Federal Bureau of Investigation. The city officials had asked the FBI to investigate a wave of bombings, but the FBI declined, citing a lack of jurisdiction (*1970 Hearings* 61-62). One of Congress's purposes in enacting Section 844 was to make clear that federal jurisdiction existed in such cases, so that the FBI could respond to requests from local officials when appropriate. In 1982, when Section 844 was amended to provide specifically for coverage of arson cases, the National Association of Attorneys General endorsed the bill.[27]

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[27] The Association stated, in part (128 Cong. Rec. S11986 (daily ed. Sept. 22, 1982)):

> Whereas, arson cases often include organized criminal elements that travel quickly between state lines making

In short, Section 844(i) covers criminal behavior that has traditionally been covered by state law. But Congress, in providing for overlapping federal-state coverage, was fully aware that it was taking that step, unlike the situation considered in *Bass*. Moreover, the states, rather than resisting federal involvement, have requested it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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state enforcement of some arson cases exceedingly difficult; and

Whereas, some federal enforcement of arson cases, whether started by fire or otherwise, is necessary in order to reduce the incidence of arson; * * *

* * * * *

Resolved That the National Association of Attorneys General supports [the pending bills].

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